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NO. 81-2285

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

v.

RICHARD OSTROSKI
Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S ARGUMENT IN REPLY

1. The petitioner never conceded that probable cause to arrest the respondent arose only after the respondent confessed to the murder.

The respondent seeks to persuade this Court that the petitioner conceded below that probable cause to arrest the respondent arose only by reason of his confession. Respondent's Brief in Opposition at 21. The record simply does not support that claim. Not only does the opinion of the Supreme Court of Connecticut carefully describe the state's stipulation otherwise,[1] the transcript of the trial discloses that the state expressly refused to enter into any such stipulation.[2]

Moreover, since the respondent objected to the admission of the confession at trial on Fifth Amendment grounds and raised the Fourth Amendment issue for the first time on appeal (prior to the first remand); Pet. App. C, 6A-7A; the trial court would not have been concerned

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1 The Supreme Court of Connecticut clearly set out the state's concession when it said: "[T]he state has conceded that there was no probable cause to seize the [respondent] *at the time he was taken to the Litchfield barracks*...." Pet. App. E, 19A (emphasis added).

2 When the respondent's attorney asked the attorney for the state to stipulate that the respondent was arrested as a result only of the confession he gave, the state's attorney stated: "Gentlemen, I would be ready to stipulate to the fact that the arrest took place at the Litchfield Barracks, as is noted in the testimony of Captain McDonnell, and then the [respondent] was removed for processing to the Canton Police Department on that date." Tr. 711. The respondent's lawyer, persisting, later suggested: "Perhaps we could stipulate to that then, that up to the point, say he confessed, there was not probable cause to arrest him." Tr. 712. To that offer, the state's attorney replied: "Well, I think that is a different stipulation"; Tr. 712; and refused to stipulate to any facts relating to probable cause. Tr. 712-13.

during the trial with when probable cause to support a seizure would have arisen. Probable cause was not then an issue. When, after the remand, the trial court did address the Fourth Amendment seizure issue, it concluded that, only after the respondent was formally arrested, after he had confessed, was he seized. Pet. App. D, 13A. It did not, therefore, have to inquire of the existence of probable cause at an earlier point in time.

2. The petitioner never conceded that the respondent was in custody before being taken to the Litchfield barracks.

The respondent attempts to suggest that the petitioner actually conceded that the respondent was in custody when he followed the New Milford police officer in his car to the New Milford Police Station. Respondent's Brief in Opposition at 18. He does so by cleverly extracting terms from the transcript out of context and disguising their true import.

Of course, the petitioner made no such concession. More important, the respondent never even claimed either in the trial court or before the Connecticut Supreme Court that he was in custody or was seized before he entered the state trooper's cruiser at New Milford and was brought to the Litchfield barracks. Instead, he consistently argued that he was seized once he entered that cruiser.[3]

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[3] At the trial, the respondent's attorney objected on Fifth Amendment grounds to evidence of statements made by the respondent in the state trooper's cruiser and said: "I submit, Your Honors, that once he is put in that police cruiser on his way to the Barracks, that he was in custody. . . ." Pet. App. A, 1A.

In his Supreme Court brief, the respondent said: "[W]hile [the respondent] may have voluntarily called the Litchfield Police Station

3. This Court has jurisdiction to review the petitioner's claim that, if the respondent was seized at all prior to his formal arrest, he was seized at a point in time at which probable cause existed.

As noted above, the petitioner never conceded that probable cause to believe the respondent committed murder arose only after his confession. Nor were the state courts deprived of an opportunity to ascertain whether and, if so when, the respondent was seized informally under the Fourth Amendment prior to his formal arrest. Indeed, that determination was required of the trial court by the Supreme Court in its remand. Pet. App. C, 8A-9A. The respondent cannot dispute, and the record amply demonstrates, that whether an informal seizure occurred in this case, and, if so when it did, became the central question before the state courts. In fact, it became so at the respondent's behest. That the trial court found that no informal seizure occurred prior to formal arrest; Pet. App. C, 13A; and the supreme court concluded that an informal seizure occurred when the respondent was "taken" to the Litchfield barracks; Pet. App. E, 19A; does not change that fact. Either court, after reviewing all of the facts in evidence, could have concluded that an informal seizure occurred prior to arrest but at a time at which the state had probable cause to believe the respondent committed murder.

To say that, because on appeal the petitioner adhered to its view that the respondent was not "seized" before his formal arrest, the state courts were not given an opportunity to pass upon the question of an earlier

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3 continued

[sic] and driven, although escorted, to the New Milford barracks [sic], his transportation to the Litchfield barracks amounted to a 'seizure' and the restriction constituted custody." Resp.'s Sup. Ct. Br. at 73. *See also* Pet. App. C, 7A (respondent's Fourth Amendment claim set out).

seizure supported by probable cause, stretches the jurisdictional requirements of 28 U.S.C. §1257(3) (1966) too far. It is sufficient for jurisdictional purposes if a federal question is raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Wood v. Georgia*, 450 U.S. 261, 264-65 (1981) (due process violation "apparent on the particular facts of a case"); *see also Braniff Airways v. Nebraska State Board*, 347 U.S. 590, 598-99 (1954) (due process claim considered where within the clear intendment of the contention in state court); R. Stern & E. Gressman, Supreme Court Practice, p. 118 (4th Ed. 1969). The Fourth Amendment issue of seizure, with or without probable cause, was unquestionably raised and decided below.

4. The respondent was not "impelled" to ratify his confession at trial by the prior admission of his confession.

The respondent claims that no error in the admission of his confession could be deemed harmless beyond a reasonable doubt by reason of his later ratification of that confession at trial. He bases this claim on the assertion that he was "impelled" to ratify his confession to overcome its prejudicial impact. *See Harrison v. United States*, 392 U.S. 219, 222-24 (1968).

The respondent's claim is fatally flawed for several reasons. Unlike *Harrison*, the respondent's attorney never asserted that his client would not testify at trial. *Cf. id.*, at 225. Instead, the respondent notified the state prior to trial that he would rely upon a defense predicated upon his absence of the mental state required for the crime. *See* Conn. Gen. Stat. §§53a-7, 53a-54a; Conn. Prac. Bk. §759. He, thus, intended to admit the act but deny the requisite mental state. *See* W. LaFave & A. Scott, Jr., Criminal Law §42 (1972). There is,

therefore, no indication that the respondent altered his trial strategy in light of the confession's admission into evidence, and the respondent has not even attempted to so argue. Respondent's Brief in Opposition at 23; *cf. Randall v. Estelle*, 492 F2d. 118, 120-21 (5th Cir. 1974) (original strategy abandoned).

The respondent, also unlike *Harrison*, prior to testifying in his defense, was questioned by his own attorney and the court concerning his decision to testify. Pet. App. B, 2A-3A. That that decision was made voluntarily and knowingly and without any condition or reservation is evident from the transcript of that inquiry. *Ibid.* And while the respondent's attorney identified evidence throughout the trial that he believed to be the "fruit of the poisonous tree" (the allegedly "tainted confession") he did not so designate his client's decision to testify or to ratify his confession. *Ibid.*

Finally, the respondent's decision to testify and personally assert a state of mind defense that included ratification of his confession made ample sense under the circumstances. The state, after all, had all of the non-confession evidence of guilt that would have remained untainted. That evidence included the respondent's palm print in blood on the counter top in the victim's apartment. The state also had matched the rare blood type found at the scene of the crime (in addition to that of the victim's) with that of the respondent's.[4] The state can readily meet its burden of proving that the respondent's decision to ratify his confession was not "impelled" by the admission into evidence of that confession but was, instead, part of a

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[4] It is beyond peradventure that the state was entitled to take a specimen of the respondent's blood and to obtain a palm print from him without his consent. *United States v. Wade*, 388 U.S. 218, 222-23 (1976) (finger-printing); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (blood sample).

carefully devised and long-planned defense strategy. *Cf. Harrison v. United States, supra*, 225-26.

5. This Court may consider the adoption and application of a good-faith exception to the Exclusionary Rule in this case.

The state's failure to assert a good-faith exception to the exclusionary rule in the state courts should not preclude this Court's consideration of it. It is plain that the federal question involved in this case, i.e. unreasonable seizure under the Fourth Amendment, was raised and decided below in compliance with this Court's jurisdictional mandate. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The remedy to be applied for a violation of the Fourth Amendment is not a separate federal question that requires special presentation below.

Moreover, none of the policy reasons for allowing the state courts to first consider the state's argument is applicable here. The record is sufficiently developed to permit consideration of the exception.[5] There is no possibility of a resolution of the claim on state grounds. *Cf. Cardinale v. Louisiana, supra*, 439 (these considerations there significant). And state courts would unquestionably be unlikely to adopt a new rule that would require them to depart from clear constitutional holdings of this Court that are binding upon them. Thus, the objective of judicial economy or that of comity would be little served by prior state court review.

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[5] Even if the record weren't adequate, however, this Court could remand the case to the state courts for development of the record in the interests of justice. *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); 28 U.S.C. §2106 (1966); R. Stern & E. Gressman, Supreme Court Practice §6.27, at 460.

Finally, the good-faith exception proposed by the state raises a recurring issue of enormous importance to the administration of criminal justice in this country. *Cf. Carlson v. Green*, 446 U.S. 14, 16 n.2 (1980) (that factor militates toward consideration of issue first presented in petition for certiorari on review of federal circuit court judgment). The time has come to consider a good-faith exception to the exclusionary rule. No case could better demonstrate the wisdom of such an exception than this one.

CONCLUSION

For the reasons stated above, the State of Connecticut urges this Court to grant the petition for a writ of certiorari to the Connecticut Supreme Court or, in the alternative, vacate and reverse the judgment of that court.

Respectfully submitted.

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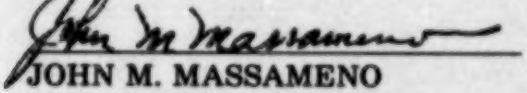

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